



## FROM COUNSEL

A Preventive Law Service of The Office of The Judge Advocate General  
*Keeping You Informed On Personal Legal Affairs*

### ***Advance Medical Directives***

#### **When You No Longer Can Decide**

We all dread losing control at the end of our lives--but most of us avoid the relatively simple planning that assures that our wishes regarding health care will be followed. Nowadays, preparing for possible end-of-life issues is simpler than ever, and is routinely part of estate planning. At the same time you and your lawyer prepare a will or trust to take care of your property, you can execute documents that direct how you'll be cared for if you're no longer able to make decisions about your life and death. For health-care decisions, some states have family consent laws permitting other family members to make some health-care decisions on your behalf. But in most states, no one, not even your spouse, has the legal right to make any kind of decision on your behalf; they might have to file a court petition to get it, and obtaining such guardianships or conservatorships can be expensive, time-consuming, and still not accomplish your wishes. As a result, most states have adopted various forms of other legal devices to help your wishes be carried out when you're incapable of making such important decisions. This planning is accomplished through advance directives that must be written. Remember that they're only valid if made while you are competent--not when you've entered an advanced state of, say, Alzheimer's disease. Also, state laws about how these documents must be witnessed and created vary greatly. It is a good idea to get your lawyers' help to assure they meet the requirements of your state and are in accord with your overall estate plan. As a military member or family member eligible for military legal assistance, your legal assistance attorney can prepare a military advance medical directive and health care power of attorney for you.

#### **Making Treatment Decisions**

Under Federal law, you may consent to or refuse any medical treatment, and receive information about the risks and possible consequences of the procedure, about advance medical directives (such as living wills), and about life-sustaining medical care and your right to choose whether to receive it. No one else, not even a family member, has the right to make these kinds of decisions, unless you've been adjudged incompetent or are unable to make such decisions because, for example, you're in a coma or it's an emergency situation. No one can force an unwilling adult to accept medical treatment, even if it means saving his or her life. Where difficulties arise is when your wishes or intentions aren't clear. That's where the next two planning tools come in.

**Advance Medical Directive (or Living Will)** A living will is a written declaration in which you state in advance your wishes about the use of life-prolonging medical care if you become terminally ill and unable to communicate. It lets your wishes be carried out even if you become unable to state them. If you don't want to burden your family with the medical expenses and prolonged grief involved in keeping you alive when there's no reasonable hope of revival, a living will typically authorizes withholding or turning off life-sustaining treatment if your condition is irreversible. Living wills typically come into play when you are incapable of making and communicating medical decisions. Usually, you'll be in a state such that if you don't receive life-sustaining treatment (intravenous feeding, respirator), you'll die. If your living will is properly prepared and clearly states your wishes, the hospital or doctor should abide by it, and will in turn be immune from criminal or civil liability for withholding treatment. Some people worry that by making out a living will, they are authorizing abandonment by the medical system, but a living will can state whatever your wishes are regarding treatment, so even if you prefer to receive all possible treatment, whatever your condition, it's a good idea to state those wishes in a living will.

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**Health-Care Powers of Attorney:** A special kind of durable power of attorney called a **health-care power of attorney (HCPA)** deals with health-care planning. In it you appoint someone else to make health-care decisions for you--including, if you wish, the decision to refuse intravenous feeding or turn off the respirator if you're brain-dead--if you become incapable of making that decision. The form can be used to make decisions about things like nursing homes, surgeries, and artificial feeding. Since it's simply impossible to predict every possible contingency in an advance medical directive, having both a living will and a HCPA enables you to handle other kinds of disability, or gray-area cases where it's not certain that your terminally ill, or your doctor or state law fail to give your wishes due weight. Better to have a trusted relative or friend make the call.

Finally, despite recent changes in the law, old habits die hard, and many doctors and nurses are still reluctant to turn off life support--even if that's what the patient wants. That's why you need an advocate appointed by your HCPA to press your intentions.

Obviously, decisions so important should be discussed in advance with your agent, who should be a spouse, child or close friend. You should try to talk about various contingencies that might arise and what he or she should do in each case.

Make sure you put a copy in your medical record. Since it's so much more flexible than a living will, the HCPA is a very useful document that could save you and your family much anxiety, grief, and money.

You can revise or revoke the HCPA (or the living will) at any time, including during a terminal illness, as long as you are competent and follow the procedures set out in your state's law. When you change or revoke either document, notify the people you gave the copies to, preferably in writing.

**Comprehensive Directives:** It's a good idea to prepare the HCPA and living will at the same time, and make sure they're compatible with each other and the rest of your estate plan. It's often possible to execute them together in a single health-care advance directive that can also enable you to state in advance whether you want to donate organs at death and also nominate a guardian of your person should one be required. These days, planning for the day when you might not be able to decide for yourself should be regarded as an essential component of any estate plan.

### **IF I HAVE A LIVING WILL, DO I STILL NEED A HEALTH-CARE POWER OF ATTORNEY**

**Absolutely!**

- A HCPA appoints an agent to act for you; a living will doesn't.
- A HCPA applies to all medical decisions (unless you specify otherwise); most living wills typically apply only to a few decisions near the end of your life, and are often limited to use if you have a "terminal illness," which has become a slippery term.
- A HCPA can include specific instructions to your agent about the issues you care most about, or what you want done in particular circumstances.

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